

***UNITED STATES - COUNTERVAILING DUTIES
ON CERTAIN CORROSION-RESISTANT CARBON
STEEL FLAT PRODUCTS FROM GERMANY***

WT/DS213

**ANSWERS OF THE UNITED STATES OF AMERICA
TO QUESTIONS FROM THE EUROPEAN COMMUNITIES**

February 21, 2002

Answers of the United States to Questions from the EC

1. As an introductory matter, the United States observes that the EC in its questions makes various assumptions regarding the “purposes” of SCM Agreement provisions. In this regard, it is important to recall the explanation of the Appellate Body in *Japan – Alcoholic Beverages*: “the treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation.”¹ In this dispute, the EC purports to find or discern various “purposes” without reference to the text of the SCM Agreement, and then refers to obligations not found in the text which presumably derive from these “purposes.” This use of “purposes” is precisely the “independent basis for interpretation” which the Appellate Body described as incorrect, and operates to circumvent the requirement in DSU Article 3.2 that Dispute Settlement Body rulings cannot add to or diminish the rights and obligations provided in the covered agreements.

(1) *Could the US explain what a "duly substantiated request" from domestic industry should contain, as opposed to the self-initiation of sunset reviews by the US authorities? Please provide information about the nature, quantity and quality of such a request that is justified under the US sunset regulations.*

2. Article 21.3 of the SCM Agreement authorizes authorities to initiate a sunset review “on their own initiative *or* upon a duly substantiated request made by or on behalf of the domestic industry” (emphasis added). Under U.S. law, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of a countervailing duty order. U.S. law does not contain a provision regarding initiation of sunset reviews based upon a “duly substantiated request.”

(2) *Could the US clarify the concept “expression of interest” referred to in initiation of reviews? Would a phone call or a fax be sufficient or does it have to be done in a written and properly motivated request? What is the provision of US law that lays down the information that need to be provided for the “expression of interest” to be a valid one?*

3. Section 351.218(d)(1)(i) of Commerce’s regulations provides for filing of a notice of intent to participate by domestic interested parties that intend to participate in a sunset review. Section 351.218(d)(1)(ii) sets forth the required contents of the notice of intent to participate, which includes, *inter alia*, information related to the identity of the domestic interested party and its legal counsel, whether the domestic interested party is related to foreign producers or exporters, the subject merchandise and country subject to the sunset review, and the applicable *Federal Register* citation. Section 351.303 of Commerce’s regulations governs the filing, format, translation, service, and certification of documents, and applies to all persons submitting documents to Commerce for consideration in any segment of an antidumping or countervailing

¹ Appellate Body report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS9/AB/R, WT/DS10/AB/R, adopted 4 October 1996, p.11, n.20.

duty proceeding, including sunset reviews. All filings, including a notice of intent to participate in a sunset review, must be in writing in accordance with the provisions of section 351.303.

- (3) *Would the US agree that, according to Article 21.3 of the SCM Agreement, the burden of proof is on the US authorities to demonstrate that "... the expiry of the duty would be likely to lead to continuation or recurrence of subsidization ..."?*

4. No, Article 21.3 does not impose a burden of proof on U.S. authorities. In order to withstand scrutiny under Article 11 of the DSU, however, an Article 21.3 sunset determination must be supported by sufficient evidence and be based on proper legal interpretations. The burden of proof is on the complaining party – in this instance, the EC – to demonstrate that Commerce's determination was not supported by adequate evidence or proper legal interpretations.

5. Article 21.3 does not contain the word "demonstrate". Instead, Article 21.3 provides for termination of a countervailing duty unless the authorities "determine" that the expiry of the duty would likely lead to continuation or recurrence of subsidization and injury. In the case at issue, Commerce determined that expiry of the countervailing duty on certain corrosion-resistant carbon steel flat products from Germany would be likely to lead to continuation or recurrence of subsidization. Commerce's determination is supported by adequate evidence and is based on a proper legal interpretation of the applicable provisions.

- (4) *Would the US agree that the ultimate purpose of a new CVD investigation and of a sunset review is the same, i.e. to determine whether or not an exporter should be subject to a CVD order in principle for the next five years? Would the US agree that the consequences of a new CVD investigation and of a sunset review are the same, i.e. that they both can result in a countervailing measure that may remain in force in principle for five years?*

6. No, the purpose of a countervailing duty investigation is to determine the existence and degree of foreign government subsidization and whether the subsidized imports are causing injury. In contrast, the purpose of a sunset review is to determine whether revocation of a countervailing duty order would be likely to lead to continuation or recurrence of subsidization and injury. The consequence of an affirmative finding of subsidization and injury in an investigation is the imposition of a countervailing duty. The consequence of an affirmative finding of likelihood of continuation or recurrence of subsidization and injury in a sunset review is the continued maintenance of the countervailing duty. The completion of a sunset review does not trigger the assessment of duties or change cash deposit requirements.

- (5) *What is the purpose of a "preliminary" determination under the US system? Does the US allow foreign exporters and foreign countries to submit further evidence to rebut the findings of the "preliminary" determination? If so, do the US authorities conduct any*

further investigation following the comments that might be received on the “preliminary” determination?

7. The purpose of Commerce’s preliminary determination in a full sunset review is to provide an explanation of Commerce’s findings concerning the likelihood of continuation or recurrence of subsidization and the net countervailable subsidy likely to prevail if the countervailing duty were revoked. Commerce’s preliminary determination takes into account the factual information and arguments submitted by the parties in their substantive responses and rebuttals.

8. Section 351.218(d)(3)(i) of Commerce’s *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the *Federal Register* of the notice of initiation. Rebuttal to a substantive response is due five days after the date the substantive response is filed. (Section 351.218(d)(4).) Section 351.218(d)(4) of the *Sunset Regulations* also provide that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired. Section 351.302(c), however, provides that a party may request an extension of a specific time limit. Unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. (Section 351.302(b).) The U.S. countervailing duty statute does not contain deadlines for submission of information in a sunset review.

9. The preliminary determination provides interested parties with an opportunity to review Commerce’s analysis of the information on the record. Commerce issues preliminary determinations in investigations and administrative reviews as well. Preliminary determinations provide interested parties with an opportunity to comment, in case and rebuttal briefs, on Commerce’s preliminary findings. Commerce is not precluded from requesting factual information after the issuance of a preliminary determination, but normally it does not do so.

(6) Could the US explain how long are the data collection periods in original CVD investigations and in sunset reviews that are laid down by the relevant US legislation?

10. Section 351.301(c)(2)(iii) of Commerce’s regulations provides that interested parties will have at least 30 days from the date of receipt to respond to a questionnaire. This rule applies to original countervailing duty investigations. Similarly, section 351.218(d)(3)(i) provides for a 30-day deadline with respect to a response to the sunset questionnaire. Furthermore, as discussed in response to Question (5) above, a party may request an extension of a specific time limit.

(7) Would the US agree that the provisions of Article 12 of the SCM Agreement, concerning an interested party’s right to present evidence, apply to both sunset reviews and administrative reviews?

11. Yes, Article 21.4 of the SCM Agreement expressly provides that the provisions of Article 12 – as opposed to the provisions of Article 11 – apply to these types of reviews.

(8) *In Section III A.6. of its Sunset Policy Bulletin (FR 16.4.98 Pages 18871-18887), the US refers to the 0.5% de minimis rate as being applicable in sunset reviews. On what basis has the US chosen to apply this 0.5% de minimis subsidization rate in sunset reviews, instead of the 1% de minimis rate laid down in Article 11.9 of the SCM Agreement? What precise purpose does this 0,5% de minimis role play in US sunset reviews and how exactly is it calculated and quantified?*

12. Because Article 21 of the SCM Agreement does not contain any *de minimis* standard, this question is not relevant to the issues raised in this dispute. Nevertheless, the United States notes that, as a matter of domestic policy, Commerce has applied a 0.5 percent *de minimis* standard in administrative (*i.e.*, assessment) reviews. The application of this standard pre-dates the Uruguay Round negotiations. The entry into force of the WTO Agreement did not require a change in this standard, because the Article 11.9 *de minimis* standard is only applicable to investigations. For this same reason, when the United States amended its law in 1994 to provide for sunset reviews, it chose to apply its long-standing 0.5 percent *de minimis* standard to sunset reviews. The United States could have chosen to apply no *de minimis* standard to sunset reviews at all.

13. Commerce's *de minimis* standard in reviews is different from its *de minimis* standard in investigations. Prior to the entry into force of the WTO Agreement, Commerce applied a 0.5 percent *de minimis* standard in investigations. However, in order to conform to Article 11.9 of the SCM Agreement, Congress amended the U.S. statute so as to require the use of a 1 percent *de minimis* standard in investigations.

14. In a sunset review, the *de minimis* standard has particular application in several respects. For example, if Commerce determined in a sunset proceeding, based on the original investigation and any administrative reviews, that the existing countervailable subsidy programs had been terminated and that the likely net countervailable rate of subsidization was *de minimis*, Commerce normally would determine that there was *no* likelihood of continuation or recurrence of subsidization.

15. In addition, the *Sunset Policy Bulletin* (section III.A.6.b) provides that, if the combined benefits of all programs considered in the sunset review have never been above *de minimis* at any time the order was in effect, and there is no likelihood that the combined benefits of such programs would be above *de minimis* in the event of removal of the duty, Commerce normally would determine that there is no likelihood of continuation or recurrence of subsidization.

16. In 1987, following a notice and comment rulemaking proceeding, Commerce published a final regulation codifying its long-standing practice of applying a 0.5 percent *de minimis*

standard in investigations and administrative reviews.² Pursuant to the regulation, net aggregate subsidies (and ad valorem dumping margins) of less than 0.5 percent would be disregarded for purposes of publishing or revoking orders, setting cash deposit rates, or assessing countervailing duties. In response to comments regarding Commerce's decision to set 0.5 percent as the *de minimis* threshold, Commerce stated as follows:

The doctrine of *de minimis non curat lex*, that the law does not concern itself with trifles, is a basic tenet of Anglo-American jurisprudence, inherent in all U.S. laws. With respect to the antidumping and countervailing duty laws, the Department has concluded that the potential benefits to domestic petitioners from orders on dumping margins or net subsidies below 0.5% are outweighed by the gains in productivity and efficiency provided by a *de minimis* rule. Even in price-sensitive markets, the effect of requiring a deposit or assessment of duty based on a rate of 0.5% *ad valorem* would be negligible. No party submitting comments has provided any information to support a different conclusion. Accordingly, it would be unreasonable for the Department and the U.S. Customs Service to squander their scarce resources administering orders for which the dumping margins or the net subsidies are below 0.5%. The fact that the Department of Treasury³ and Commerce may not always have applied a uniform *de minimis* standard in the past is an additional reason supporting the adoption of a fixed standard which can be applied consistently in the future.⁴

In response to comments that the *de minimis* threshold be set at 1%, Commerce stated that,

After many years of applying a 0.5% *de minimis* threshold, the Department has developed no basis to conclude that 1% represents a level of benefit not worth the expense of investigations or annual reviews....⁵

17. As explained in the United States First Written Submission (para. 39), Commerce starts with the total *ad valorem* rate determined in the original investigation and considers whether, since the investigation, it has found subsidy programs to be terminated and/or new programs to be countervailable. Based on findings, which normally are made in the context of administrative reviews, Commerce may adjust the rate determined in the original investigation to take these subsequent findings into account.

² *Antidumping and Countervailing Duties; De Minimis Dumping Margins and De Minimis Subsidies*, 52 FR 30660 (August 17, 1987) ("De Minimis Rule") (Exhibit US-6).

³ Until 1980, the U.S. Department of Treasury administered the antidumping and countervailing duty laws.

⁴ *De Minimis Rule*, 52 FR at 30661.

⁵ *Id.*

- (9) *Is it the US position that the recurrence or continuation of any amount of subsidy, however small or even at zero level is sufficient to prolong countervailing measures under an Article 21.3 review?*

18. Article 21.3 provides for consideration of whether expiry of a countervailing duty would likely lead to a continuation or recurrence of subsidization and injury. Footnote 52 states that a finding, in the most recent administrative review, that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty. This is consistent with the prospective nature of a sunset review. Thus, the level of subsidization at the time of a sunset review is not necessarily determinative of the outcome of a sunset review. However, if Commerce determined in a particular sunset review that there was no likelihood that the net countervailable subsidy rate would exceed 0.5 percent *ad valorem* in the event of revocation of the countervailing duty, Commerce would determine that there was no likelihood of continuation or recurrence of subsidization and revoke the duty.

- (10) *Is the subsidy rate the US DOC reports to the US ITC in a sunset review the subsidy rate that is likely to continue or recur if the CVD order is revoked? If so, on what precise evidence is this rate based?*

19. See answer to Question (8) above.

- (11) *In Section III.A.6(b) of its Sunset Policy Bulletin, it is stated :*

The SAA at 889, and the House Report at 63, state that, [I]f the combined benefits of all programs considered by [the Department] for purposes of its likelihood determination have never been above de minimis at any time the order was in effect, and if there is no likelihood that the combined benefits of such programs would be above de minimis in the event of revocation or termination, [the Department] should determine that there is no likelihood of continuation or recurrence of countervailable subsidies.

Is it not the case that, if the 1% de minimis rate provided for in Article 11.9 of the SCM Agreement was used, such a determination would have been made in the corrosion resistant steel from Germany case?

20. For the reasons set forth in the United States' First Written Submission (paras. 70-87) and Oral Statement (paras. 20-29), the Article 11.9 *de minimis* standard does not apply to Article 21.3 sunset reviews. Article 21.3 does not contain any *de minimis* standard. Commerce does apply a 0.5 percent *de minimis* standard in sunset reviews, but does not do so because of any obligation imposed by the SCM Agreement. In the final results of the full sunset review of corrosion resistant steel from Germany, Commerce determined that revocation of the order would be likely to lead to continuation or recurrence of a countervailable subsidy and found that

the net countervailable subsidy likely to prevail if the order was revoked was 0.54 percent *ad valorem*, which is above the *de minimis* standard under U.S. law.

(12) *In the corrosion resistant steel from Germany case, has the US DOC actually calculated the level of subsidization prevailing at the time of carrying out the sunset review? On what basis did the US DOC refuse to adjust the subsidy rates, for programmes found in the original investigation, by deducting the diminution in benefit resulting under the US DOC's methodology for allocating the benefit of non-recurring subsidy programs? How is this refusal to deduct for the time that has past justified under the SCM Agreement? Would the DOC accept that, under its declining balance methodology for non-recurring subsidies, and given the fact that 9 years had elapsed between the original investigation period and the sunset review, the level of any remaining subsidization would now be even below 0.5% ad valorem?*

21. No, Commerce normally does not determine the present net countervailable subsidy rate in a sunset review, and it did not calculate the level of subsidization present at the time of the sunset review in the corrosion-resistant steel from Germany case. Commerce did, however, adjust the net countervailable subsidy rate determined in the investigation to account for two programs that the EC and German producers argued had been terminated with no continuing benefits. *See United States' First Written Submission, para.40.* Nevertheless, nothing in Article 21.3 or any other provision of the SCM Agreement mandates a particular methodology for determining whether subsidization is likely to continue or recur if the duty were revoked.

22. The focus of a sunset review is necessarily on the possible future behaviour of foreign governments and exporters. The best evidence of that behaviour is the net countervailable subsidy rate determined in the original investigation because it is indicative of behaviour without the discipline of a countervailing duty in place. Starting with the net countervailable subsidy rate from the original investigation, Commerce may make adjustments, including adjustments for subsidies for which benefits were allocated over time, in accordance with the *Sunset Policy Bulletin*. (See *Sunset Policy Bulletin*, III.B.3.) Commerce, however, normally makes such determinations in the context of an annual administrative review where interested parties may submit, *inter alia*, information concerning the level of subsidization present during the period of review for Commerce's examination.

23. With respect to the EC's question regarding Commerce's declining balance methodology, as explained in the United States' First Written Submission (paras. 98-101), the *ad valorem* subsidy rate for any period cannot be determined without knowing the applicable sales volume.

(13) *Would the US agree that the rationale of the de minimis provision in the SCM Agreement is the fact that such a low level of subsidisation cannot cause material injury? In this respect, could the US explain why a subsidy level of below 1% is irrebutably presumed*

not to cause injury in an original investigation while it is supposed to cause injury in a sunset review?

24. The only *de minimis* standard found in the SCM Agreement is in Article 11.9 which, by its terms, is limited to investigations. Neither Article 11.9 nor any other provision of the SCM Agreement provides a rationale for the *de minimis* standard. This standard is a product of negotiations. When Commerce codified its own *de minimis* standard in its regulations, it considered several rationales, including administrative efficiency, as providing a basis for the standard. See response to question (8).

(14) *In the corrosion resistant steel from Germany sunset finding, has the DOC found evidence of new countervailable subsidies granted since 1993 which benefit the producers in question? Why exactly did the US reject the petitioner's allegations that there were new subsidies in the sunset review?*

25. As discussed in Commerce's preliminary sunset determination, there were no administrative reviews of this order. As a result, Commerce had not considered whether German producers benefitted from additional subsidies granted since the original investigation. Commerce did not consider domestic interested parties' allegations concerning new subsidies in the context of the sunset review because U.S. law intends that such allegations should normally be made in the context of administrative reviews and the lack of any administrative reviews, in and of itself, was not sufficient to constitute good cause to consider the petitioners' allegations in the context of the sunset review. Furthermore, once Commerce found likelihood based on previously investigated subsidies, a finding of additional new subsidies would not have changed its affirmative likelihood determination. *Commerce Sunset Final Decision Memorandum*, pp.41-43 (Exhibit EC-10).

(15) *Does the US agree that Footnote 52 of the SCM Agreement applies only to administrative reviews under its system?*

26. Footnote 52 stands for the proposition that an existing subsidy program could be the basis for a determination in a sunset review that the expiry of the countervailing duty would likely lead to the continuation of subsidization even if Commerce found a net countervailable subsidy rate of *zero* attributable to that program in the most recent administrative review. In other words, footnote 52 means that the current level of subsidization is not decisive as to whether subsidization is likely to recur.

(16) *In the context of sunset reviews conducted so far by the US under the SCM Agreement, and leaving aside the cases where subsidy programs have been found to be terminated or the cases where the domestic industry expressed no interest, are there any other cases where a determination was made by the US DOC that subsidisation would not be likely to continue or recur? If such a case exists, could the US list the name and number of each case and provide examples of the grounds on which such a finding has been made?*

Furthermore, are there any cases where the duty rate proposed to ITC reflects the result of an administrative review rather than the original finding?

27. The dispute before this Panel involves Commerce's sunset determination concerning certain corrosion-resistant carbon steel flat products from Germany. As a general matter, Commerce sunset determinations involving other merchandise and other countries are available as public, published documents and can be found on Commerce's website, the website of the U.S. Government Printing Office, or through commercial database services such as Lexis. We note, however, that to date, Commerce has found no likelihood of continuation or recurrence of subsidization in the following three full sunset reviews: C-122-404, Live Swine from Canada, 64 Fed. Reg. 60301 (November 4, 1999); C-333-401, Cotton Shop Towels from Peru, 64 Fed. Reg. 66884 (November 30, 1999); and C-201-505, POS Cookware from Mexico, 65 FR 284, (January 4, 2000).

(17) *Could the US explain how likely it is that a CV duty to offset a net subsidy rate of 0.54% ad valorem is alone likely to affect substantially, ceteris paribus, the total volume of exports and the volume of exports to the US market of the products subject to this dispute by the German steel companies in question?*

28. Issues concerning the volume of exports to the United States are properly considered in the context of the USITC's injury determination, which has not been challenged by the EC in this dispute. Nevertheless, the United States would point out that the *ad valorem* countervailing duty rate determined in the investigation was 0.60 percent and, according to the EC (EC Oral Statement, para. 25), the German producers stopped shipping to the United States once this 0.60 percent countervailing duty was in place.

(18) *Could the US explain how much should the denominator from the German steel companies involved in the present case reach in order to establish in the sunset review that the net subsidy rate would be above 1% ad valorem?*

(19) *What was the amount of the sales denominator used in calculating the 0.39% benefit for the CIG programme in the original investigation? What was the amount of the numerator? How much of this numerator related to subsidy payments made prior to 1 January 1986? How much of this numerator related to subsidy payments made prior to 1 January 1987?*

29. Commerce's finding of likelihood of continuation or recurrence of subsidization is based on and supported by the administrative record of the sunset review. The EC's questions (19) and (20) are not really questions. Rather, the EC is asking the United States to research and perform new calculations in the context of the EC's challenge to the United States' laws and regulations concerning sunset reviews and to a particular Commerce sunset determination. The United States does not believe it is appropriate to do so in this context.